



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

May 21, 2003

Ms. Dona G. Hamilton  
General Counsel  
University of Houston System  
311 East Cullen Building  
Houston, Texas 77204-2028

OR2003-3417

Dear Ms. Hamilton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181430.

The University of Houston (the "university") received a written request for records pertaining to various legal matters. You state that some of the responsive information will be released to the requestor. You contend, however, that the remaining information coming within the scope of the request, a representative sample of which you submitted to this office, is excepted from required disclosure pursuant to sections 552.101, 552.102, 552.103, 552.107(1), 552.111, and 552.117 of the Government Code.<sup>1</sup> We will discuss each of the submitted "attachments" in turn.

We first note that among the documents you seek to withhold are public court documents that are specifically made public under section 552.022 of the Government Code, which provides in relevant part:

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The court-filed documents you submitted to this office in Attachment E are specifically made public under section 552.022(a)(17) of the Government Code. Section 552.103 does not constitute "other law" for purposes of section 552.022(a)(17).<sup>2</sup> Consequently, the university must release the public court documents that we have marked as being public under section 552.022(a)(17), except to the extent those documents contain information made confidential by other law, as discussed below.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision." (Emphasis added.) We first note that some of the submitted court documents, as well as portions of the remaining submitted information, contain information about university students. In this regard, section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or

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<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the information that the university must withhold in accordance with FERPA.

The court documents, as well as other documents you submitted to this office, also contain information that the university must withhold pursuant to section 552.117(1) of the Government Code, which requires that the university withhold an employee's home address, home telephone number, social security number, and information that reveals whether the employee has family members, but only if the employee elected to keep this information confidential in accordance with section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, in order to withhold section 552.117(1) information from the public, a proper election must be made prior to the receipt of the request for information. Consequently, to the extent that university employees have timely elected to withhold personal information in accordance with section 552.024, the university must withhold that information pursuant to section 552.117(1) of the Government Code. We have marked the types of information that are subject to section 552.117(1).

Even if university employees have not made a timely section 552.024 election, those employees' social security numbers may nevertheless be confidential under federal law in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security numbers were obtained or are maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security numbers contained in the records at issue were obtained or are maintained by the university pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the university to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, the university should ensure that these numbers were not obtained or maintained by the university pursuant to any provision of law enacted on or after October 1, 1990.

You contend that the documents you submitted as Attachment D and the remaining documents in Attachment E are excepted from required public disclosure pursuant to section 552.103 of the Government Code. Section 552.103 is often referred to as the "litigation" exception. To show that section 552.103(a) is applicable, the university must demonstrate that (1) litigation was pending or reasonably anticipated on the date the

university received the records request and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

You have submitted to this office as Attachment D a “Notice of Charge of Discrimination,” the university’s response to that charge addressed to the Equal Employment Opportunity Commission, and records the university obtained from opposing counsel regarding another unrelated matter. In this regard, we note that once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, to the extent the opposing parties in the litigation have seen or had access to these records, there is no justification for now withholding those records from the requestor pursuant to section 552.103. Consequently, the only type of document that the university may withhold pursuant to section 552.103 is the university’s response to the Equal Employment Opportunity Commission.<sup>3</sup> See Open Records Decision No. 386 (1983) (filing of EEOC complaint constitutes evidence that likelihood of litigation is more than mere conjecture).

Attachment D and F also contain private e-mail addresses. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

We have marked the private e-mail addresses that must be withheld pursuant to section 552.137 unless the university receives an affirmative consent to release from the person to whom the e-mail address belongs. We note that section 552.137 does not apply to a public employee’s governmental e-mail address.

You next contend that the documents you submitted as Attachment G constitute “work product” that is excepted from public disclosure pursuant to section 552.111 of the Government Code. See generally Open Records Decision No. 677 (2002). Section 552.111 excepts from required public disclosure an “interagency or intraagency memorandum or

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<sup>3</sup>We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

letter that would not be available by law to a party in litigation with the agency.” This office has stated that to withhold attorney work product under section 552.111, a governmental body must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney’s mental processes, conclusions, and legal theories. *See id.*

When showing that the requested documents were created in anticipation of litigation for the first prong of the work product test, a governmental body’s task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and created documents for the purpose of preparing for such litigation. *See id.* at 5. Based on your representations and our review of the information at issue, we conclude that you have met the first prong of the work product test for the four attachments comprising Attachment G. Furthermore, having reviewed the information at issue, we conclude that most of the documents contained in Attachment G reveal attorney mental impressions, conclusions, and strategies and thus may be withheld as attorney work product under section 552.111 of the Government Code. We have, however, marked a few documents in Attachment G that do not consist of attorney work product and thus must be released to the requestor.

You contend that the contents of Attachment H are excepted from required public disclosure pursuant to section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a

communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). After reviewing the contents of Attachment H, we conclude that the university may withhold all of the documents contained therein pursuant to section 552.107(1) of the Government Code.

Finally, you contend that certain information contained in a university employee's personnel file, which you submitted as Attachment J, is excepted from public disclosure pursuant to section 552.102 of the Government Code in conjunction with the common-law right of privacy. Section 552.102 excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ." The scope of section 552.102(a) protection, however, is very narrow. *See Open Records Decision No. 336* (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.). This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is protected by common-law privacy. *See Open Records Decision Nos. 600* (1992), 545 (1990). The submitted documents include personal financial information that is protected from disclosure under common-law privacy. We have marked the information that the university must withhold pursuant to section 552.102 of the Government Code.

We also note that among the documents submitted under Attachment J are federal tax return forms that constitute confidential "tax return information" and as such must be withheld in their entirety pursuant to federal law. *See* 26 U.S.C. § 6103. Additionally, the university must withhold the Texas driver's license number contained in these records pursuant to section 552.130(a)(1) of the Government Code. The remaining portions of Attachment J must be released to the requestor.

In summary, the university must release the court-filed documents contained in Attachment E except to the extent those documents contain information made confidential under FERPA or under section 552.117(1). The university must also withhold pursuant to FERPA and section 552.117(1) the information we have marked in the other submitted records. Additionally, social security numbers made confidential by federal law must be withheld from the public. The university may withhold its complaint responses filed with the Equal Employment Opportunity Commission pursuant to section 552.103. The private e-mail addresses that we have marked are subject to section 552.137. The university may withhold

all of Attachment G as attorney work product under section 552.111, except for those documents that we have marked, which must be released. Attachment H may be withheld in its entirety pursuant to section 552.107(1). The university must also withhold the information we have marked in Attachment J as coming within the protection of section 552.102(a). The university must also withhold the "tax return information" and the Texas driver's license number in Attachment J. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah Swanson", with a long horizontal flourish extending to the right.

Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/RWP/seg

Ref: ID# 181430

Enc: Submitted documents

c: Ms. Rene Huggins  
P.O. Box 1944  
New Caney, Texas 77357  
(w/o enclosures)